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Supreme Court of the United States

OCTOBER TERM, 1961

No. 742

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

TONY CAMPOS MEJIA,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

Petitioner, Tony Campos Mejia, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment denying petitioner leave to file a petition for writ of mandate requiring the District Court for the Southern District of California to dismiss Counts Two and Three of an indictment alleging a violation of Title 21 U. S. C. 174 returned September 13, 1961.

On the 12th day of April 1962, petitioner will have been in Federal custody for five years. He was sentenced May 27, 1957, to be imprisoned for twenty years for an alleged violation of Title 21 U. S. C. 176(a), which judgment and sentence was heretofore set aside and remanded for a new trial. *(Mejia v. U. S.* 291 F. 2d 198.)

Counts Two and Three of the superseding indictment allege violations which are based on occurrences known to the Federal officers, agents and the United States Attorney but which were not presented originally to the Grand Jury for action, until approximately four and one-half years after petitioner was originally taken into Federal custody.

Opinions Below.

The opinion of the court below is in the nature of a minute order and not yet reported.

A copy is attached hereto marked Appendix A.

The opinion of the United States Court of Appeals for the Ninth Circuit wherein the petitioner was successful in having his judgment of conviction set aside and the cause remanded for new trial (*Mejia v. U. S.*) is reported in 291 F. 2d 198.*

Grounds on Which the Jurisdiction of This Court Is Involved.

1. The date of the judgment sought to be reviewed and the time of its entry is: December 19, 1961.

2. An extension in which to file Petition for Writ of Certiorari was entered on January 18, 1962, extending the time to file said petition to and including February 17, 1962.

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*Although not directly involved in this appeal, the effect of this decision is to return petitioner's status to a similar position which he occupied in April of 1957, and nullify the approximately five years of the time heretofore served by petitioner and accredited to him under the original judgment of conviction. Petitioner would have been first eligible to apply for parole under the original sentence in January 1964.

3. The statutory provision believed to confer on the United States Court of Appeals for the Ninth Circuit to grant a writ of mandate is Title 28 U. S. C. 1251.

4. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Rule 37(c), Federal Rules of Criminal Procedure.

Questions Presented for Review.

1. Does the Sixth Amendment to the Constitution of the United States require the presentation of an alleged violation to the Grand Jury without unnecessary delay?

2. Does the Sixth Amendment to the Constitution of the United States, with respect to the requirement of a speedy trial, apply both before and after formal indictment wherein the proposed defendant is in Federal custody and the Government has knowledge of all of the facts pertinent to the alleged violation?

3. Is it a denial of due process of law for the Government to withhold alleged violations from the Grand Jury which would properly be joined pursuant to Rules 8(a); 13 and 14 of Title 18 U. S. C. for later presentation in the event the first case is lost or set aside for any reason?

4. Does Rule 48(b) require the District Court to dismiss a charge against the defendant where the Government has knowingly and wilfully failed to present the charges to the Grand Jury until four and one-half years after acquiring information as to all of the facts and circumstances pertaining to the alleged offenses?

5. If the action of the Government in the case at bar is unconstitutional and improper, should the Court below be ordered to issue a writ or mandate to prevent the illegal, improper and unjust action of the Government?

Constitutional Provisions and Statutes Involved.

The Fifth Amendment of the Constitution provides:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any crime case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use."

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Federal Rules, General, Rule 48(b) provides:

"Dismissal

By the Court.

If there is unnecessary delay in presenting the charge to a Grand Jury or in filing an information against the defendant, who has been held to answer to the District Court, or if there is unnecessary delay in bringing the defendant to trial, the Court may dismiss the indictment, information or complaint."

21 U. S. C. 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilities the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954) the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this action the defendant is shown to have or to have had possession of the narcotic drug, such possession shall

be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

21 U. S. C. 176a (a):

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced; or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Chronology of Proceedings.

1. On April 12, 1957, defendant was taken into custody for the alleged violation of 21 U. S. C. 176(a).

On April 16, 1957, the Grand Jury for the County of Los Angeles, in the State of California, returned an indictment charging the Petitioner, Tony Gaitan Mejia, with the sale of heroin on March 20, 1957, in violation of Section 11500 of the Health and Safety Code of the State of California.* (Indictment Case No. 190163, Superior Court of the State of California, County of Los Angeles.) The record thereof indicates that one Justin Burley, who was then a Deputy Sheriff of Los Angeles County and assigned to the Narcotic Detail, was to be the State's witness.

On April 17, 1957, the Grand Jury for the Southern District of California, Central Division, returned an indictment charging the Petitioner with the unlawful receipt, concealment and transportation of approximately 47 pounds, 4 ounces of bulk marijuana on or about February 20, 1957.

On May 7 to 9, 1957, trial of the petitioner was held. During the trial of said charge, Justin Burley, State officer assigned to narcotics, attempted to testify as to the facts pertaining to an alleged sale of heroin on March 20, 1957 (the specific charges now contained in Counts Two and Three of the superseding indictment), but the trial Court excluded such testimony on the ground that the petitioner was not charged with any crime related thereto. [Rep. Tr. 84, 85.]

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*The section of the state of California statute that provides substantially the same penalty as that provided by section 21 U.S.C. 174.

On May 9, 1957, Petitioner was found guilty as charged in the indictment, and on May 27, 1957, was sentenced to be imprisoned for 20 years and ordered to pay a fine of $5000.

On June 7, 1957, on motion of the people, the indictment previously returned by the Grand Jury of the County of Los Angeles was dismissed in the "interest of justice." (Minutes of Department 41, June 7, 1957, Honorable Louis Burke presiding).

The Petitioner's conviction in the District Court for the Southern District of California was affirmed on appeal on March 5, 1958, in *Mejia v. United States* (9th Cir., 1958), 253 F. 2d 300.

On May 22, 1959, Mejia moved for a new trial on grounds of newly discovered evidence. On June 18, 1960, after several hearings thereon, the District Court denied the motion and the Petitioner appealed.

On June 14, 1961 the U. S. Court of Appeals for the Ninth Circuit reversed the District Court's Order, holding that on the basis of the newly discovered evidence, a jury could find that a reasonable doubt existed, and remanded the matter to the District Court for a new trial. The mandate of the Circuit Court was read in the District Court on July 20, 1961. (Crim. Docket, United States District Court).

On September 13, 1961, after hearing evidence presented by the United States Attorney for the Southern District of California, the Grand Jury for the Southern District of California, Central Division, returned a superseding Indictment, No. 30088 Criminal, against Petitioner Mejia. The first count thereof was identical to the single count of the old indictment Number 25850, upon which the new trial had been ordered

Counts Two and Three of the new indictment charged Mejia with the sale and concealment of a certain quantity of heroin on March 20, 1957, for which he had been previously charged in the State Indictment of April 10, 1957.*

On September 13, 1961, Petitioner moved to dismiss Counts Two and Three of the Superseding Indictment pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure, on the ground that the delay of four and one half years in presenting those charges to the Grand Jury was unnecessary, unreasonable, and unconstitutional. This motion was denied by the District Court. The District Court thereafter ordered a stay to all further proceedings in order to give petitioner opportunity to avail himself of his appropriate appellate court remedies.

On September 19, 1961, Mejia petitioned the Ninth U. S. Court of Appeals for the Ninth Circuit to issue a Writ of Mandamus ordering the District Court Judge to dismiss Counts Two and Three of the Indictment.**

On December 19, 1961, the United States Court of Appeals for the Ninth Circuit denied petitioner's motion for a writ of mandate directing the District Court to dismiss Counts Two and Three of the indictment.

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*A copy of the [illegible] is attached hereto as Appendix "B".

**Petitioner's motion before the Court of Appeals was couched in [illegible] terms, asking it to file the petition in [illegible] proceeding and for the writ of mandate. Petitioner's motion was silent however, and it appears from the record before that the [illegible] was on the merits of the question rather than [illegible] matter which on appeal [illegible]

Reasons for Granting the Writ and Arguments Amplifying the Same.

Certiorari Should be Granted to Determine Important Questions With Respect to Basic Rights Guaranteed by the Constitution of the United States, but Never Directly Passed Upon by This Court.

1. The Sixth Amendment to the Constitution of the United States Requires Governmental Officials to Present Evidence of an Alleged Violation to the Grand Jury Without Unreasonable Delay.

In the instant case, throughout the proceedings below, the Government has maintained that the Sixth Amendment protects the individual's rights to a speedy trial only "after formal complaint is lodged against a defendant in a criminal case."*

The Sixth Amendment does not so provide, and such a strained construction could lead only to many evils which the framers of our Constitution so diligently sought to prevent. The case at bar is a classic example. The Government has withheld information from the Grand Jury, and now maintains it may prosecute the Petitioner on charges filed just prior to the running of the five year statute of limitations. The effect of such a delay in the prosecution on a statute which requires a minimum sentence of five years for each violation is to extend the possible punishment at least 5 years, just due to inaction.

This is the very thing the framers of our Constitution sought to prevent.

*This quotation is taken from the Government's memorandum in opposition to motion and petition of writ of mandamus before the United States Court of Appeals, Ninth Circuit, page 11, lines 11-13.

Historically, the reason for the rights guaranteed by the Sixth Amendment was to prevent the Government from imprisoning a person and letting him languish in jail without bringing him to trial, as apparently was the practice in the English Kingdom from the thirteenth to seventeenth centuries.

In the modern administration of justice, the problem generally presented to this Court is not the delay in bringing an indictment or providing a speedy trial, but is that of rushing through the procedural requirements to such an extent that the defendant's rights are prejudiced by speed rather than delay. This Court in passing on the subject of excess speed, however, has alluded to the rule that the right of a defendant to a speedy trial after arrest is guaranteed by the Sixth Amendment.

In the case of *Smith v. United States*, 360 U. S. 1, at page 10 this Court stated:

> "... while justice should be administered with dispatch, the essential ingredient is orderly experience and not merely speed. It is well to note that in this very case, the orderly speed that was generated through the filing of the information caused many of the difficulties which led the Court below to conclude the petitioner had been deprived of due process of law. *Moreover, if, contrary to sound judicial administration in our Federal system, arrest and prosecution are followed by inordinate delay prior to indictment, the defendant may, under appropriate circumstances, invoke the protection of our Sixth Amendment.*" (Emphasis added.)

2. It Is a Denial of Due Process of Law for the Government to Withhold Alleged Violations From the Grand Jury Which Would Properly Be Joined Pursuant to Rules 8(a), 13 and 14 of Title 18 U. S. C. for Later Presentation in the Event the First Case Is Decided Adversely to the Government or Is Set Aside for Any Reason

A defendant need not show that he has been prejudiced by the unnecessary delay for it is presumed that a fair trial is impossible after a long lapse of time

United States v. Lustman (2d Cir., F. 2d 475, *cert. den.* 358 U. S. [illegible] 68 S. Ct. 118, 3 L. Ed. 2d 100);

United States v. Chase (D. C. Ill. 1955), 135 Fed. Supp. 230.

The purpose of Rule 48(b) is to prevent any unnecessary delay in presentation of charges to a Grand Jury not caused by the defendant.

United States v. [illegible] (2d Cir., F. 2d 215;

United States v. Thain (D. C. Del. 1955), 17 F. R. D. 15

The lapse of [illegible] years from the acquisition of knowledge of the alleged crimes to the time of presentation of the charges to the Grand Jury constitutes unnecessary delay.

United States v. Lustman, where 3 years held to be unnecessary;

Pugach v. United States, where 3 [illegible] held to be unnecessary;

3. Rule 48(b) Requires the District Court to Dismiss a Charge Against the Defendant Where the Government Has Knowingly and Wilfully Failed to Present the Charges to the Grand Jury Within a Reasonable Time

Rule 48(b) of the Federal Rules of Criminal Procedure provides that the trial court may dismiss an indictment, information or complaint if unnecessary delay occurs in the presentation of the charge to the grand jury, the filing of the information or complaint, the trial of the defendant, or the imposition of sentence.

When Dan Mesta was indicted on the original count, the government had within its knowledge all the facts it now relies on with respect to the "new" counts. On April 19, 1957, the day before the primary Federal indictment of Mesta was charged by the State of California [illegible] Section 11500 of the California Health and Safety Code on the basis of the same facts [illegible] by the Federal Government in the new counts, and the arrest [illegible] was [illegible] Government [illegible] material on the day [illegible] Mesta [illegible] selling [illegible] Moreover, at Mesta's trial on the original count, Federal [illegible] testify [illegible] the [illegible] on the new counts, [illegible] ground that Mesta was not charged with those crimes. [Rep. Tr. pp. 84-86]

[illegible] the Government did [illegible] though they had [illegible] to [illegible] the original count [illegible] 1957. And [illegible] to [illegible] the new [illegible]

Government given any reason why, after four and one-half years, it finally decided to bring these charges now.

In the absence of suitable explanation of these matters, the Government's delay of four and one half years (under a 5 year statute of limitations) seems quite unreasonable and quite unnecessary and dismissal in the District Court should become mandatory rather than discretionary. The trial court, however, permitted the "new" indictment to be without any explanation by the Government. This was error and a clear abuse of the discretion granted by Rule 48(b).

4. If the Action of the Government in the Case at Bar Is Unconstitutional and Improper, the Court Below Should Be Ordered to Issue a Writ of Mandate to Prevent the Illegal, Improper and Unjust Action of the Government.

In the Court below, the Government contended that the United States Court of Appeals for the Ninth Circuit had the power to issue the extraordinary writ sought by the petitioner and, indeed, the "All Writs" statute (28 U.S.C. Sec. 1651) authorizes this Court to issue writs of mandamus in aid of its jurisdiction and to prevent clear injustices.

*Government's motion to dismiss petition for writ of mandamus, page 3, fn. 2. [illegible]
287 F. 2d 324 (9th Cir. 1961).

Conclusion.

It is respectfully submitted that this is a case where injustice has been done and a judicial mistake made. The effect of the proceedings to date, if the Government is allowed to present to the jury, the allegations on Counts Two and Three of the superseding indictment, is to penalize the defendant for maintaining his innocence on the original conviction.

The petitioner should not be required to make a choice between establishing his innocence by pursuing his legal rights or languishing in jail unjustly through fear of further reprisals. The petitioner, in this case, was willing to stand trial a second time under the original indictment on which he feels he can prove his innocence. It is grossly unfair, however, to allow the Government to bring up charges on which the petitioner must attempt to defend at a time when his ability to do so is seriously impaired by the passage of time, with the consequent unavailability of witnesses, and his general lack of touch with the outside world occasioned by his imprisonment.

Wherefore, petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

[illegible]

Jack E. Hildreth and Arthur S. Bell, Jr. are members of the Federal Indigent Panel and have been requested by the petitioner to act as his attorneys before this Court, and they hereby consent to act.

JACK E. HILDRETH,

ARTHUR S. BELL, JR.

APPENDIX "A."

Order on Petition for Writ of Mandamus.

United States Court of Appeals, Ninth Circuit.

Toney Campos Mejia, Petitioner, v. United States of America, Respondent. Misc. No. 1357.

Endorsed: Filed Dec. 29, 1961. Frank H. Schmid, Clerk.

Before Pope, Hamley and Koelsch, Circuit Judges.

Per Curiam.

Counsel who successfully prosecuted the appeal in Mejia v. United States, 9 Cir., 291 F. 2d 198, has made application to this court for leave to file a petition for a writ of mandamus on behalf of said Mejia and has filed an affidavit in support of that application setting forth the reasons and grounds which it is proposed to be set forth in such a petition. Upon suggestion of this court the United States has filed a memorandum in opposition to the petitioner's application.

The matter presented by the motion of the petitioner for leave to file such petition was set down for hearing and argued before the court by counsel for petitioner and by counsel on behalf of the United States Attorney representing the United States. Upon consideration of the application it is ordered that leave to file such petition for writ of mandamus be and the same is hereby denied.

Walter L. Pope,
Frederick G. Hamley,
M. Oliver Koelsch,
United States Circuit Judges.

APPENDIX "B."

Indictment.

[U.S.C., Title 21, Sec. 176(a)—Illegal concealment of marihuana; U.S.C., Title 21, Sec. 174—Sale and Concealment of Heroin]

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, v. Tony Campos Mejia, Defendant. No. 30008.

Filed: Sep. 13, 1961.

The Grand Jury charges:

COUNT ONE

[21 U. S. C. 176(a)]

On or about February 20, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Tony Campos Mejia, with intent to defraud the United States did, after importation, knowingly and unlawfully receive, conceal, and transport, and facilitate the concealment and transportation of, approximately 47 pounds, 1 ounce of bulk marihuana, which said marihuana, as the defendant then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21, Section 176(a).

COUNT TWO

[21 U. S. C. 174]

On or about March 20, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Tony Campos Mejia knowingly and unlawfully sold and facilitated

the sale to Justin Burley of 4 grains of heroin, a narcotic drug which, as the defendant then and there well knew, had been imported into the United States of America contrary to United States Code, Title 24, Section 173.

COUNT THREE

[21 U. S. C. 174]

On or about March 20, 1957, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Tony Campos Mejia knowingly and unlawfully received, concealed, transported and facilitated the concealment of and transportation of 4 grains of heroin, a narcotic drug which, as the defendant then and there well knew, previously had been imported into the United States of America contrary to United States Code, Title 21, Section 173.

A True Bill

Foreman

Francis C. Whelan

United States Attorney

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In the Supreme Court of the United States

OCTOBER TERM, 1961

TONY CAMPOS MEJIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

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Attorney,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1961

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TONY CAMPOS MEJIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The order of the court of appeals denying leave to file a petition for a writ of mandamus was entered on December 19, 1961 (Pet. App. A). The petition for a writ of certiorari was filed on February 2[illegible]

1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly refused to consider, on an application for a writ of mandamus, the issue of whether two counts of an indictment should be dismissed before trial for delay in return of those counts.

STATEMENT

In 1957, petitioner was convicted in the United States District Court for the Southern District of California of the transportation of unlawfully imported marihuana on February 20, 1957. Petitioner was sentenced to imprisonment for twenty years. On June 14, 1961, the court of appeals, on the basis of the showing made by petitioner on a motion for a new trial, set aside the conviction and ordered a new trial. 291 F. 2d 198.

On September 13, 1961 a superseding indictment was returned against petitioner. Count 1, alleging a transaction in *marihuana* on February 20, 1957, was identical with that on which petitioner had previously been convicted and a new trial ordered. Counts 2 and 3 charged the sale and concealment of *heroin* on March 20, 1957. Petitioner moved to have counts 2 and 3 of the superseding indictment dismissed under Rule 48, F.R. Crim. P., on the ground that the delay in bringing those charges was unreasonable and in violation of petitioner's right to a speedy trial. In

the course of argument on the motion, the trial court noted that California state charges, based on the herein transaction of March 20, 1957, had been dismissed after petitioner's conviction for the marihuana offense in 1957 because petitioner was then serving a federal sentence (R. 4-10). The court was of the view that the government had no reason to present a federal indictment based on such a transaction while petitioner's conviction for the earlier marihuana offense was outstanding. It accordingly denied the motion to dismiss (R. 19-20).

Petitioner then sought to have the court of appeals issue a writ of mandamus ordering the district court to dismiss counts 2 and 3. The court of appeals denied leave to file the petition.

ARGUMENT

The merits of the district court's order denying the motion to dismiss counts 2 and 3 of the indictment can be reviewed if petitioner is convicted and sentenced on those counts. The court of appeals properly declined to grant what would be in effect an interlocutory appeal by considering the issue on a petition for a writ of mandamus. *Price* v. *United States*, 271 U.S. 513, 520; *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 383-385; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21. There are no special circumstances which would justify the extraordinary relief of mandamus, or the granting of a piecemeal appeal in a criminal case. *See Cobbledick* v. *United States*, 309 U.S. 323.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1962